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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 218

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES E. NELSON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit, reversing the convictions of respondents on the ground that certain documentary evidence delivered by respondent Nelson to a Senate investigating committee should have been excluded from evidence as obtained by the Committee in violation of the Fourth Amendment.

OPINIONS BELOW

The majority and dissenting opinions in the

Court of Appeals (R. 754-779) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1953 (R. 779-781). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37(b)(2) and 45(a), F. R. Crim P.

QUESTIONS PRESENTED

1. Whether the Court of Appeals was warranted in reversing the finding of the district court that respondent Nelson had voluntarily turned over certain records to a Senate investigating committee, and in holding that the consent was involuntary because it was given during questioning by the committee in open session, and because a representative of the committee was sent to Nelson's home to obtain the documents.

2. Whether the rule of *Weeks* v. *United States*, 232 U.S. 383, suppressing evidence unlawfully obtained by law enforcement officers of the executive branch of the government, should be extended to evidence improperly obtained by persons acting for legislative investigating committees.

STATUTES INVOLVED

D. C. Code (1951) § 22-1501 provides:

> If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell

or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

18 U.S.C. 3486 provides:

No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against

him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.

STATEMENT

Respondents were tried under a two count indictment returned in the District Court for the District of Columbia charging (1) carrying on of a lottery in violation of D.C. Code (1951) § 22-1501 and (2) conspiracy to violate that statute (R. 1-8). They were all found guilty under count 1, and Mr. and Mrs. Nelson, Mr. and Mrs. Nowland, and Blight Lee were convicted on count 2 as well (R. 106-116). On appeal, the convictions and the sentences [1] were reversed by the Court of Appeals, one judge dissenting, on the ground that documentary evidence introduced at the trial

[1] The sentences imposed were as follows:

Charles E. Nelson and Virginia Madge Nelson, one to three years and a fine of one thousand dollars on the first count, twenty months to five years and a fine of ten thousand dollars on count two, said sentences to run concurrently (R. 106-108), *i.e.* an over-all sentence of twenty months to five years and a fine of ten thousand dollars. Robert L. Nowland and Mary C. Nowland, one to three years and a fine of one thousand dollars on the first count, twenty months to five years and a fine of twenty-five hundred dollars on the second count, the sentences to run concurrently (R. 108-110), *i.e.* an over-all sentence of twenty months to five years and a fine of twenty-five hundred dollars. Blight Lee, one to three years on the first count, one to four years on the second count, also to run concurrently (R. 110-111). James E. Lowry and Robert Kirby, one to three years on the first count (R. 111, 112). Bertha MacWilliams, a fine of one thousand dollars, one to three years imprisonment suspended, placed on probation (R. 113). William MacWilliams, eight months to two years, and a fine of one thousand dollars (R. 114). Effie Lou Trent, three months to nine months (R. 115). Elizabeth Brady, one month to ten months (R. 116).

should have been excluded because it was thought to have been obtained from respondent Nelson by a Senate investigating committee as the result of an illegal search and seizure (R. 755-767).[2]

The circumstances under which the evidence in issue was obtained from Nelson appear from Exhibit 21, the transcript of testimony before the Senate Commitee to Investigate Organized Crime in Interstate Commerce (the Kefauver Committee),[2a] and from the affidavits and counter affidavits submitted on Nelson's motion for the return of the documents and their suppression as evidence.[3]

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[2] Since, under the majority view, the documents should have been returned to Nelson before trial and therefore would not have been available at the trial, the convictions were reversed as to all defendants. See *McDonald* v. *United States*, 335 U. S. 451, 456.

[2a] The transcript was before the District Court on the motion to suppress (R. 18).

[3] Before any indictment was returned, Nelson brought an independent action for return of the documents against the United States Attorney to whom the Senate Committee had entrusted them. After counter affidavits were filed, the cause was argued without hearing testimony, Nelson's then attorney stating that there was no necessity therefor (R. 18). Before decision in that proceeding, a perjury indictment was returned against Nelson. When the district court denied the motion on the ground that Nelson had voluntarily turned over the documents to the Senate Committee and that they were properly in the hands of the United States Attorney, the order of denial was entered in the perjury proceeding (R. 39). Six days later the instant lottery indictment was returned. Objection to the admissibility of the documents was renewed during the instant trial, but the trial judge declared that he would not interrupt the trial to decide a matter which had already been acted upon (R. 432-437). After judgment, the trial court, without objection by the government, ordered the records relating to the motion for the return of the documents to be included in the record on appeal in this cause (R. 135-136).

On appeal, the Court of Appeals, on its own motion, raised the issue of whether the order denying return of the property

The pertinent facts are as follows:

At about 3 P.M., on August 8, 1951, Nelson was served with a subpoena to appear on August 9 before a subcommittee of the Senate Committee to Investigate Organized Crime in Interstate Commerce (Ex. 21, p. 2127). On August 9, the subcommittee met in open session at Washington, at 10:30 A.M. (p. 2052), and adjourned at 4:10 P.M. (p. 2215), with a recess for the witness from 12:30

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was *res adjudicata* in relation to the instant proceeding (R. 767). The majority decided that it was not, holding that the order entered after the perjury indictment was interlocutory even though the proceeding was commenced before return of the indictments. The court recognized that its holding in this respect was in conflict with the decisions in *United States* v. *Poller*, 43 F. 2d 911 (C.A. 2), and *In re Sana Laboratories*, 115 F. 2d 717 (C.A. 3), certiorari denied, 312 U. S. 688 (R. 769).

While we think that the court below was wrong in holding that in every case where an order denying a motion to suppress is entered after indictment the order is interlocutory even though the motion was made before indictment, we do not raise the issue of *res adjudicata* in this petition because we think that the result reached is correct on the particular facts of this case. This Court in *United States* v. *Wallace Co.*, 336 U. S. 793, 802, ruled that "Whether a motion is to be treated as independent and plenary or as merely a procedural step in a pending trial must be determined by particular circumstances." See also *Cogen* v. *United States*, 278 U. S. 221, 225. In this case all parties seem to have treated the motion to suppress as part of the perjury proceeding pending when the order of denial was entered. The order of denial was entered in that proceeding. The trial judge in this case treated it as a preliminary ruling with respect to this trial (though he did say that it was "res adjudicata here" (R. 435-6)). The United States Attorney originally raised no issue of *res adjudicata* on appeal and agreed to have the record on the motion included in the record on this appeal. We think that under these particular circumstances—the parties and the trial court treating the denial of the suppression motion as a preliminary ruling and a step in the trial—the order of denial was properly considered by the court below not to be a final binding judgment.

to 2:30 (pp. 2138-2139). Three witnesses, one of whom appeared with counsel (p. 2082), testified before Nelson was called (pp. 2055, 2082, 2094), and one was called after Nelson's testimony was concluded (p. 2197). Nelson's entire testimony occupies less than one hundred pages of the transcript (pp. 2101-2197). The witness immediately before Nelson gave testimony in Nelson's presence that he was working in the numbers business for Blight Lee and that Lee had told him he was working for Nelson (p. 2098).

After Nelson was sworn, he was asked some preliminary questions as to his address and his place of business (pp. 2101-2106). After he had stated that he was a farmer and president of the North Beach Amusement Company (p. 2102), he was asked whether he had any other company and he replied that he did not (p. 2106). He was asked about the Nowland Company, and answered that he knew nothing about any Nowland Company (p. 2106). He was asked whether he had heard of Robert Nowland and Associates and he answered "Yes, I have heard of Robert Nowland" (p. 2107). He was asked "What is that" and replied "Really I don't know what it is." He denied having had any interest in the business but stated that he "probably" had received money from it (pp. 2107-2108). The following colloquies are illustrative:

> The CHAIRMAN: Let me ask you a question. Is it not a fact that you have been receiving large sums of money from this concern and have been paying income taxes on it?

Mr. NELSON: Well, if——

The CHAIRMAN: Just answer yes or no.

Mr. NELSON: Whatever is on the income tax.

The CHAIRMAN: You are the witness, sworn to tell the truth. Did you or did you not?

Mr. NELSON: Did I or did I not what?

The CHAIRMAN: Pay income taxes on large sums of money received from this concern.

Mr. NELSON: I always pay income taxes on whatever money I receive.

The CHAIRMAN: Then don't try to tell us that you don't know when you received the money and paid income taxes on it. Now you are a pretty smart man, and we don't think——

Mr. NELSON: I am not trying to make you believe I don't want to cooperate.

The CHAIRMAN: Why don't you tell us frankly then what you know?

Mr. NELSON: Sir?

The CHAIRMAN: Why don't you tell us frankly what you know instead of letting us try to—instead of trying to conceal the facts and make it look like you don't know what this is all about?

Mr. NELSON: After you have talked with me a while, maybe you will have a different opinion of me. You will find that I will try to cooperate.

The CHAIRMAN: Then suppose you tell us what the concern is and what you received from it.

Mr. NELSON: What I received from Nowland Associates?

The CHAIRMAN: Yes.

Mr. NELSON: I don't remember honestly, I don't remember.

Mr. RICE: What type of business is it?

Mr. NELSON: I really don't know. I was never actively engaged in it in any way.

Mr. RICE: How did you get into it?

Mr. NELSON: I furnished the money.

Mr. RICE: You furnished the money. How much money did you furnish?

Mr. NELSON: I don't know about that.

Mr. RICE: Approximately.

Mr. NELSON: Well, that would alternate from time to time, and I, just to take it right out of my head, it is next to an impossible thing to do. [2108-2110]

* * * * *

Mr. NELSON: Who is Mr. Nowland?

Mr. RICE: Yes.

Mr. NELSON: Mr. Nowland——

Mr. RICE: Robert Nowland.

Mr. NELSON: You asked me who is Mr. Nowland?

Mr. RICE: Yes.

Mr. NELSON: I don't mean to be impertinent, but he is Mr. Nowland.

Senator KEFAUVER: Mr. Nelson, we have got to get along better here. We want to know what was your transaction with Mr. Nowland. When did you start doing business with him? What was this operation that you put the money into? You know about it and you might as well tell us about it.

Mr. NELSON: The man said he had a way he

could make some money, and I put up the money, and go ahead and make some money, and he split with me, which was all right with me.

Senator KEFAUVER: What was the way you were going to make the money?

Mr. NELSON: I never discussed that with him. [2111-2112]

* * * * *

The CHAIRMAN: Let me say this to the witness: Our records show that you received $180,000 in four years as your half of this business operation, which would represent $360,000 in that time, and it was in full a $6 million operation.

Now what do you want to say about it? You heard me. Don't ask me to repeat it. You heard me.

Mr. NELSON: I don't have anything to say about it.

Senator KEFAUVER: Is that substantially the size of the operation?

Mr. NELSON: I really don't know.

Senator KEFAUVER: Did you get $180,000?

Mr. NELSON: I couldn't say that I did and I wouldn't say that I didn't.

The CHAIRMAN: You don't deny it?

Mr. NELSON: No, I wouldn't deny it because I am not sure.

The CHAIRMAN: And if you received $180,000 do you want us to believe that you don't know where it came from and what kind of business was operated in order to pay you $180,000?

If you want us to believe it, you are absolutely mistaken, because no sensible man would believe it, and it is an insult to the intelligence of the committee for you to come here and think that you could get away with it.

Mr. NELSON: I agree with you it is an embarrassing thing.

The CHAIRMAN: Why don't you tell us the truth?

Mr. NELSON: I am trying to tell you the truth. [2113-2114]

* * * * *

After the questions and answers had proceeded like this for some time, counsel for the Committee stated (p. 2116):

Mr. RICE: Frankly, I think his attitude is contemptuous, Senator, and I think he should be at least instructed that the law is to the effect that if a witness knows the answer to the question he can be cited for contempt or perjury just the same as if he refuses to answer if he knows the answer and says he does not know. Do you understand that?

Nelson still, however, insisted that he really didn't know what business Nowland Associates was in (pp. 2117-2118), but finally said "I can tell you what I think it was. * * * I think it was gambling," (p. 2118). Subsequently, the following ensued (pp. 2124-2126):

Senator KEFAUVER: Mr. Nelson, when Mr. Nowland would come and bring you $5000 or $15,000, you would have to keep some record

of how much he brought you. Where would you keep that record?

Mr. NELSON: We would just make a note of what we were taking in. It was kept—you want to know how we kept track of it, was that it?

Senator KEFAUVER: You made apparently forty-nine some odd thousand dollars in 1948 out of Nowland. Where would you put that down when he would bring you money?

Mr. NELSON: Just take a book and list what we took in and what the expenses against it, whatever it was, and then at the end of the year —it was kept on a cash basis.

Senator KEFAUVER: Did you keep that book or did he have the book?

Mr. NELSON: Who have what book?

Senator KEFAUVER: This book you are talking about.

Mr. NELSON: I am talking about what money he give me. I made a note of it.

Senator KEFAUVER: You made a note on the book. Where is that book?

Mr. NELSON: I suppose—I don't know whether I still have them or not. I may have throwed them away. They are kept in separate years. You asked where the book was, didn't you?

Senator KEFAUVER: That is right.

Mr. NELSON: They are kept in separate years, and I don't know—I will try to locate them for you, if it will be of any help.

Senator KEFAUVER: All right. You see if you can find the 1948 book, for instance. That would be very helpful.

Mr. NELSON: 1948?

Senator KEFAUVER: Yes. That is the year Mr. Rice was asking you about.

Mr. NELSON: Sir?

Senator KEFAUVER: That was the year he was asking you about when you said you made forty-eight thousand dollars out of Nowland. That was your share. See if you can find that book, will you?

Mr. NELSON: For 1948?

Senator KEFAUVER: Yes.

Mr. NELSON: I will.

Just before the noon recess, Nelson was asked whether he had any interest in the P & N Amusement Company at 5806 Central Avenue and replied that he did, that it was a partnership between himself and Mr. Pumphrey (pp. 2133-2134). But when asked what was at 5806 Central Avenue he said he didn't know and, when told it was a pool room, said (p. 2135):

Mr. NELSON: It may seem funny to you, and I hate to have it appear that way, but believe me, I don't know. I don't know of any poolroom there.

Thereupon, the committee chairman made the statement quoted by the court below (pp. 2135-2136) (R. 760-761):

The CHAIRMAN: Mr. Nelson, it doesn't seem funny, but it does seem very suspicious.

Mr. NELSON: I agree with you, and I understand.

The CHAIRMAN: You are the only one that can clear it up. If you are in the clear, this

committee wants to give you an opportunity to clear it up, because at this minute it looks very dark and very suspicious.

Mr. NELSON: I realize that.

The CHAIRMAN: And very incriminating.

Mr. NELSON: I realize that.

The CHAIRMAN: You are the only one that can clear it up, and now is your chance, because the committee is not—this is not going to be laughed off with the committee. We are going to the bottom of it, and we are going to bring it to the authorities, and those who are guilty are going to be prosecuted, and if you are one of them, you are going to be in it.

Now if you are not one of them, now is the time to make it clear, and so far you have not made it clear.

We are going to take a recess shortly and I simply suggest that you think over carefully and come back when you resume the stand prepared to tell us the truth. Now is your chance, and it is up to you entirely. Do you understand what I say?

Mr. NELSON: I get the general drift. You don't feel like I am doing what I can.

The CHAIRMAN: No, I do not.

Mr. NELSON: Believe me, I have never been in this poolroom that he mentions that I can remember.

The CHAIRMAN: I am talking about the whole picture, what we understand is a $6 million operation, from which you have received several hundred thousand dollars. Now you are not going to make us believe you are so ignorant as

you appear to be. Now you, therefore, have the chance to come back this afternoon and tell us the truth if you want to, and if you don't clear it up, you have nobody to blame but yourself if you are involved in some prosecution later.

After the noon recess, Nelson still insisted that he did not know how Nowland Associates operated (pp. 2139-2145), not even its address (p. 2142), nor why Nowland had "quit" (p. 2146) some months before (p. 2147). When Nelson was asked how much money he had received from the numbers business in 1951, the following took place (pp. 2149-2150):

Mr. NELSON: I have to go back to whatever records we keep.

Mr. RICE: You keep records?

Mr. NELSON: I keep incoming and outgoing money.

Mr. RICE: You keep your ins and outs? Is that what you call it?

Mr. NELSON: I guess so. You can call it that, if you like.

Mr. RICE: Where do you keep those ins and outs?

Mr. NELSON: I generally keep them at home.

Mr. RICE: Where do you keep them?

Mr. NELSON: At home.

Mr. RICE: Is it home now?

Mr. NELSON: Are they at home now?

Mr. RICE: Yes, your records.

Mr. NELSON: Possibly so.

Mr. RICE: Let's get definite about it. Where are the records of how much you have taken in this year?

Mr. NELSON: I have them at home, whatever records I have.

Mr. RICE: What sort of a book do you have them in?

Mr. NELSON: They are in a little red book.

Mr. RICE: And if we were to suggest that a staff member might like to accompany you out to the little red book, can he see that?

Mr. NELSON: It would be all right with me.

Mr. RICE: We may make those arrangements.

Mr. NELSON: All right.

Thereafter, there were discussions as to Nelson's bank accounts (pp. 2150-2158) and Nelson was asked whether he had a statement of his assets. He answered "I have never done that, but it wouldn't be too much trouble" (p. 2158). Then followed considerable questioning as to Nelson's property and expenses on his farm (pp. 2159-2176) and his relationship with an Internal Revenue agent (pp. 2186-2194). For a short period before the conclusion of Nelson's testimony, the questioning reverted to the Nowland business and proceeded much as before (pp. 2181-2185).

At the conclusion of Nelson's testimony, on August 9, 1951, the following occurred (pp. 2196-2197):

> Senator HUNT: Mr. Nelson, we will have a staff member accompany you to your home and if you will turn over to him your account book, the little red book you spoke of, he will see that you get a receipt for it and the committee will return it to you at the very earliest date, so as not to inconvenience you any.

You are now excused, Mr. Nelson.

Mr. NELSON: I am afraid I do not understand what it is you want me to do.

Senator HUNT: Well, we will have a member of the staff—you tell me if you are not hearing—go with you out to your home and you turn over to him a statement of your net worth together with your little account book that you spoke of as the little red book, where you keep your "ins" and "outs", as you said. In addition to that, the subpoena that you are now testifying under will hold until such time as the committee releases the subpoena.

Now, is there anything you do not understand?

Mr. NELSON: You expect me to send a statement of the net worth back tonight?

Senator HUNT: Not necessarily, but we would like it just as soon as you can have it prepared. We do want, however, the little red book you spoke of, your "ins" and "outs".

That is all, Mr. Nelson.

The person who accompanied Nelson to his farm was Thomas Smith, a member of the Maryland police, who had been assigned to the Committee as an investigator (R. 12). According to Smith's uncontroverted affidavit, filed in connection with the motion to suppress, when they got to Nelson's farm, Nelson said that the 1951 "little red book" was not all together as yet, but that he had something in his office which would indicate what his business was. Nelson then pulled out the bottom drawer of a file cabinet in which there were about

ten large envelopes apparently filled with papers, and two or three little bound books. Nelson told the investigator he could look at and take those records if he wished. The records related to the years 1940 to 1950, but not to the year 1951. Nelson helped the investigator tie the records together. (R. 14.)

Subsequently, a subpoena was issued for Nelson to appear before the subcommittee on August 17 for further testimony, but Nelson could not be served (R. 14-15). On August 17, the subcommittee certified the records to the United States Attorney for "perjury" and "for any such other action as may be required" (Tr. of Com. Hear., p. 2953).

On the motion to suppress, the district court found that the property "was voluntarily turned over" by Nelson to the Senate Committee, and that "it is now in the lawful possession" of the United States Attorney (R. 39, see fn. 3, *supra,* pp. 5-6). This finding the majority of the court below held to be error on the ground that the circumstances did not show free and intelligent consent on Nelson's part, without physical or moral compulsion. It thought that the "day-long" interrogation of Nelson under compulsion of a subpoena, without his having been advised of his right to counsel or privilege against incrimination, the references to the penalty for perjury for untrue testimony, and the fact that Smith accompanied Nelson to his home, all established that "Nelson's freedom of choice had been dissolved in a brooding omnipresence of compulsion." (R. 762). It considered irrelevant

the fact that the "little red book," which was what the committe had sent Smith out to get, might have been the subject of a subpoena duces tecum. The ultimate conclusion was that the records were obtained as the result of a search and seizure which violated the Fourth Amendment and should therefore have been suppressed as evidence under the rule of *Weeks* v. *United States,* 232 U.S. 383 (R. 765).[4] The dissenting judge was of the view that there was no search and seizure in this case and found no element of coercion "except that which arose from the fact that Nelson was a witness" (R. 771-776).

REASONS FOR GRANTING THE WRIT

In finding duress in this case the Court of Appeals has in effect equated the appearance of a responsible adult at an open hearing of a legislative investigating committee with the private unremitting grilling of a youthful suspect in police custody. Consistently applied, this unwarranted extension of the proper standard for measuring coercion would mean that all documents or information transmitted in response to a demand by a person with official authority would automatically be held to be given involuntarily. Such a holding represents a serious departure from the principles laid down in the decisions of this Court in a manner which conflicts with rulings in other circuits and

[4] The majority of the court expressly refused to pass upon two other contentions made by respondents: (a) that the documents could not be considered because they were turned over by Nelson on the agreement that they were to be returned promptly to him (R. 757), and (b) that, in any event, 18 U.S.C. 3486 prevented the use of the documents (R. 767).

which can severely impair the functioning, not only of Congressional investigating committees, but of all federal law enforcement agencies. Moreover, the decision below assumes that the rule of suppression of evidence, laid down by this court in *Weeks* v. *United States,* 232 U.S. 383, for evidence obtained in violation of the Fourth Amendment by law enforcement officers of the executive branch of the government, applies to the same extent to evidence improperly obtained by persons acting for the legislative branch. That premise, however, actually represents a decision on a novel and important question of law which has not been and should be determined by this Court.

1. The decision of the court below that there was in this case an unreasonable search and seizure is so clearly erroneous on the law and the facts, and so dangerous to the orderly processes of law enforcement, that it is imperative that it be reviewed by this Court. Nelson's acts, in pointing out and turning over unrequested documents to a committee investigator who accompanied him pursuant to his consent in open public hearing to hand over a specific document which he had himself described and identified, are assimilated by the Court of Appeals to the situation presented in *Judd* v. *United States,* 190 F. 2d 649 (C.A. D.C.), where an equivocal "consent" to a general search was given during the course of prolonged nighttime questioning in the secrecy of a jail. But neither the circumstances of Nelson's consent, nor the standards applicable to witnesses before Congressional commit-

tees, are at all comparable to those which control cases like *Judd*.

(a). Other than the fact that Nelson was testifying under subpoena, none of the factual elements on which the decision below purports to rest are presented by this record. The "day long interrogation of Nelson by the Senate Committee" (R. 389), turns out to be merely part of an open session which altogether lasted three hours and forty minutes. It is doubtful that Nelson's period of testimony covered more than two hours, and even then with a two hour recess in between (see Statement, *supra*, pp. 6-7). The hearing was held almost at the end of the life of a committee whose deliberations cannot be said to have lacked public notice (see Tr. of Com. Hear., p. 2954). Nelson was subpoenaed at three o'clock in the afternoon of the day before he was asked to appear and thus had ample opportunity to consult with counsel. He could scarcely have been unaware that the committee was interested in numbers activities, and any doubt he might have had on the score would certainly have been dispelled by the testimony of the witness who preceded him. He was apparently also present when another witness appeared with counsel (see Statement, *supra*, p. 7), and there was a two hour recess during which he could have consulted counsel before he gave his definite consent to turn over the document. Under these circumstances there is no basis for finding an element of compulsion in the fact that the committee did not specifically inform Nelson of his right to ap-

pear with counsel and of his privilege against self-incrimination.[5]

As for the "threats of prosecution" (R. 761), the majority has taken from the record two instances, separated by testimony, in which the Committee pointed out, certainly fairly in relation to Nelson's testimony before it, that (1) evasion by a witness who knew the answer was the equivalent of false swearing (Tr. of Com. Hear., p. 2116, see R. 760), and (2) that, while the guilty were going to be prosecuted, "if you are not one of them, now is the time to make it clear, and so far you have not made it clear" (Tr. of Com. Hear., pp. 2135-2136, see R. 760-761). To say that these "threats" had an "immediate effect" because, following the noon recess, "Nelson was almost loquacious in supplying information of an incriminating nature" (R. 761), involves an interpretation of the record of the afternoon session that is hardly supported by the actual transcript. Nelson may have been a little

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[5] Nelson appeared before the Committee on August 8, 1951. The cases of *Patricia Blau* v. *United States*, 340 U. S. 159, *Irving Blau* v. *United States*, 340 U. S. 332, *Hoffman* v. *United States*, 341 U. S. 479, and *Greenberg* v. *United States*, 341 U. S. 944, had been decided by this Court on December 11, 1950, January 15, 1951, May 28, 1951, and June 4, 1951, respectively. Certainly, the right of a witness before the Committee to plead self-incrimination was well-known long before the end of the Committee's hearings, and that right was frequently exercised. See, *e.g.*, *Poretto* v. *United States*, 196 F. 2d 392 (C.A. 5); *Marcello* v. *United States*, 196 F. 2d 437 (C.A. 5); *United States* v. *Costello*, 198 F. 2d 200 (C.A. 2); *Aiuppa* v. *United States*, 201 F. 2d 287 (C.A. 6); *Bowers* v. *United States*, 202 F. 2d 447, 449 (C.A.D.C.); *Doto* v. *United States*, C.A. 2, No. 268, decided June 24, 1953.

Likewise, many witnesses had appeared before this and other Committees with counsel, as even a casual survey of the press during recent years will confirm.

more informative about his assets, although even as to this he showed a surprising degree of uncertainty (see Tr. of Com. Hear., pp. 2149-2181), but whenever the questioning reverted to the issue of Nowland Associates, his knowledge or memory was just as poor as before (see Tr. of Com. Hear., pp. 2139-2147, 2181-2185).

The court below also misinterprets the circumstances and significance of the investigator's journey to Nelson's farm. It is not irrelevant, as the majority states (R. 763), that the Committee sent its investigator (Smith) to get a specific book which it could have subpoenaed. This Court pointed out, in *Davis* v. *United States,* 328 U.S. 582, 591, that the fact that documents sought are documents which the government has a right to see is an important element in determining whether officers "exceed the permissible limits of persuasion in obtaining them." Here, there was not even persuasion. The Committee investigator[6] merely asked for the "little red book" which Nelson had publicly stated he would give. The court completely ignores the fact that it was Nelson, and not the investigator, who opened the drawer of the file cabinet and revealed the existence of records which neither the Committee nor the investigator had asked for or knew of. That Nelson's acts were the result of deliberate strategy, and not of "a brooding omnipresence of compulsion" (R. 762), is shown by the fact that a week later, when he was so un-

[6] It should be noted that an investigator does not function as a policeman merely because the person who fills the assignment happens in some other capacity to be a policeman.

intimidated as to avoid a further subpoena, he sent in the statement of his assets which he had promised the Committee. (Tr. of Com. Hear., p. 2791).[7]

A fair reading of the record on this phase of the case clearly reveals, we submit, that Nelson, for reasons best known to himself, had decided to adopt the strategy of appearing to "cooperate" with the Committee. At the very outset of the hearing, he stated that he wished to cooperate (Ex. 21, p. 2109; see also p. 2141), and before any of the so called "threats," he suggested that he could get records for the Committee (p. 2125). That this strategy may have proved to be unsuccessful does not render it any the less deliberate and voluntary. The technique is not a new one. Every agency of the federal government which has the duty of investigating encounters numerous individuals who state that they have nothing to hide and are willing to produce books and records to establish their innocence. The Bureau of Internal Revenue, the Anti-Trust Division of the Department of Justice, the F. B. I., the Wage and Hour Division, to name but a few, frequently meet such cooperation. Often

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[7] Though it does not rest decision on the point (see fn. 4, *supra*, p. 19), the court below also mentions the fact that the Committee may have promised to return the books to Nelson as soon as possible (R. 763). Aside from the fact that this related only to the "little red book" which was all that the committee requested, it is evident that, when the records revealed evidence of law violation, the committee quite properly turned them over to law enforcement authorities. *Perlman* v. *United States*, 247 U.S. 7; *Ex parte Fuller*, 262 U.S. 91; *Johnson* v. *United States*, 228 U.S. 457; *Stroud* v. *United States*, 251 U.S. 15. See also *Schauble* v. *United States*, 40 F. 2d 363 (C.A. 8); *Davis* v. *United States*, 138 F. 2d 406 (C.A. 5), certiorari denied, 321 U. S. 775; *Fuller* v. *United States*, 31 F. 2d 747 (C.A. 2), certiorari denied, 280 U.S. 566; *United States* v. *Hart*, 216 Fed. 374 (N.D. N.Y.).

the persons being investigated prove to be right; an examination of the records establishes the invalidity of the complaint or suspicion and no more is heard of the matter. But often the records produced reveal more than the producer expected or hoped. That result and the ensuing prosecution hardly render the initial action involuntary.

Essentially, as the dissenting judge points out, the only element of coercion that exists in this case is that "which arose from the fact that Nelson was a witness" (R. 776). Phrased otherwise, the only basis for finding coercion arises from the fact that the original request for production of the document, for which the evidence here in question was substituted, came from persons clothed with official authority. A holding that this establishes compulsion represents a truly revolutionary departure in law enforcement which would vitiate the whole procedure for informal investigation of complaints. It runs counter to the principle of voluntariness announced by this Court in cases such as *United States* v. *Mitchell*, 322 U.S. 65, 69-70, and *United States* v. *Carignan*, 342 U.S. 36, 39, 41,[8] as well as a host of lower court decisions[9] in which

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[8] See also, e.g., *Wan* v. *United States*, 266 U.S. 1, 14; *Davis* v. *United States*, 328 U.S. 582; and *Zap* v. *United States*, 328 U.S. 624.

[9] E.g. *Young* v. *Territory of Hawaii*, 163 F. 2d 490, 497-498 (C.A. 9); *United States* v. *Antonelli Fire Works Co.*, 155 F. 2d 631 (C.A. 2), certiorari denied, 329 U.S. 742; *Bowles* v. *Beatrice Creamery Co.*, 146 F. 2d 774 (C.A. 10); *Stobble* v. *United States*, 91 F. 2d 69, 71 (C.A. 7); *United States* v. *Bianco*, 96 F. 2d 97 (C.A. 2); *De Lapp* v. *United States*, 53 F. 2d 627 (C.A. 8), certiorari denied, 284 U.S. 684; *Cantrell* v. *United States*, 15 F. 2d 953 (C.A. 5), certiorari denied, 273 U.S. 768; *Gatterdam* v. *United States*, 5 F. 2d 673 (C.A. 6).

consent has been found to have been voluntary, although request for production or information was made by persons with authority, often under circumstances with more elements of compulsion than were here present. As the dissenting judge below stated (R. 775):

> * * * we ought not to transmute invitation into invasion, admonitions normal in judicial proceedings into illegal compulsions, absence of objection into paralysis, proffers into searches, or acceptances into seizures; unless the facts compel us to do so.

(b). Even if there were greater warrant in the record for various of the specific factual findings made *de novo* by the Court of Appeals,[10] its ultimate finding of compulsion would fall because of its failure to apply a standard of coercion appropriate to proceedings before a Congressional committee. The majority uncritically borrowed the familiar guides for testing duress where one is being privately interrogated by the police after arrest (R. 758-759). At open legislative hearings, however, the witness is not in custody and may depart when questioning is finished; his appearance is in public; the press is almost invariably present; the advice of counsel may normally be sought, if desired; some rules of procedure are customarily followed. Current history shows that refusals to answer or to produce documents (on the ground of

[10] For instance, as to the extent of the interrogation, the extent and nature of the so-called "threats" and Nelson's response thereto, the activities of Smith at Nelson's farm.

self-incrimination, other alleged constitutional rights, pertinency, or health) are common, and are often accepted, at least for the time being. Physical pressures to answer or produce are rare, if they exist at all, and what psychological pressures there may be are not of the same order or kind as those which may be present in the "police station or district attorney's office" (R. 764). The truth is that a fact-finding tribunal cannot properly appraise the "freedom of choice" (R. 762) of a responsible legislative-witness like Nelson as if he were an arrested suspect being secretly interrogated by law enforcement officials.[11]

2. There is no doubt that the right to be free of unreasonable search and seizure guaranteed by the Fourth Amendment operates as a restraint on the legislative, as well as the executive branch, of the government. But it does not follow that the *Weeks* rule of suppression of evidence must be applied to evidence obtained as the result of improper acts of persons acting for the legislative branch of the government. The exclusionary rule is not explicit in the Fourth Amendment; it is a rule of evidence which the federal courts have devised to implement that provision. *Wolf* v. *Colorado,* 338 U.S. 25; *Stefanelli* v. *Minard,* 342 U.S. 117. Thus far, the actual decisions in which the rule has been applied

[11] As Judge Prettyman suggests (R. 775), the standard for measuring coercion on a witness at a judicial trial is obviously also different from that for private police investigation. If Nelson, as a witness at a trial, were asked the same questions as here by the prosecuting attorney and made the same responses, it clearly could not be said that he was subjected to duress.

have involved acts of federal law enforcement officers of the executive branch which has the primary duty of law enforcement, the theory being that the prosecution should not be allowed to benefit from its own wrongdoing. This Court in *Burdeau* v. *McDowell*, 256 U.S. 465, declined to extend the rule of suppression to evidence wrongfully taken from the defendant by a private individual. And this Court has stated in dicta,[12] and lower courts have held,[13] that the rule of suppression in the federal courts does not apply to evidence wrongfully obtained by state law enforcement officers acting solely in enforcement of state law.

While the expressed rationale of these decisions (that the Fourth Amendment does not apply to private individuals and does not operate directly on the states) is inapplicable to actions on behalf of the legislative branch of the federal government, there are underlying policy considerations which do apply. The prosecuting arm of the government has no such control over the actions of private individuals or of state officers as it has over its own law enforcement officers. Similarly, the executive branch has no control over the actions of agents for

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[12] *Weeks* v. *United States*, *supra*, 232 U.S. at p. 398; *Byars* v. *United States*, 273 U.S. 28, 33; *McGuire* v. *United States*, 273 U.S. 95, 99; *Feldman* v. *United States*, 322 U.S. 487, 492.

[13] E.g., *United States* v. *Diuguid*, 146 F. 2d 848 (C.A. 2), certiorari denied, 325 U.S. 857; *Miller* v. *United States*, 50 F. 2d 505, 507 (C.A. 3), certiorari denied, 284 U.S. 651; *Wheatley* v. *United States*, 159 F. 2d 599, 601 (C.A. 4); *Shushan* v. *United States*, 117 F. 2d 110, 117 (C.A. 5), certiorari denied, 313 U.S. 574, rehearing denied, 314 U.S. 706; *Lotto* v. *United States*, 157 F. 2d 623, 625-626 (C.A. 8), certiorari denied, 330 U.S. 811; *Butler* v. *United States*, 153 F. 2d 993, 994 (C.A. 10).

the legislative branch of the government. Moreover, just as state officers or private individuals do not act for the purpose of enforcing federal laws, legislative investigating committees, even if discovery of crime should result from their investigation, are not clothed with law enforcement powers or functions, and do not act primarily for the purpose of enforcing laws. On the other hand, Congressional committees, as arms of the federal government, are directly bound by the Amendment and there is certainly substance to the view that the *Weeks* rule should extend to all federal agencies. Under these circumstances, we believe that there is a serious question whether or not the executive should be barred from using and the courts barred from considering relevant evidence incidentally obtained by agents of the legislative branch even if such evidence is wrongfully secured. That question is one which this Court should decide.[14]

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[14] If no basis for suppression of the documents is found, there does arise the question of whether the documents were properly admitted against Nelson in the face of 18 U.S.C. 3486, *supra*, pp. 3-4. The dissenting judge was of the view that the documents were improperly admitted against Nelson but that on the whole record the error was harmless (R. 777-778). The majority did not pass on the issue (see fn. 4, *supra*, p. 19). The existence of this issue should not militate against the grant of certiorari. If the documents need not have been returned to Nelson, they were proper evidence against all the other respondents. Moreover, if not returned, they become available, even under the statute, on Nelson's pending trial for perjury. A decision as to the right to hold these particular documents is therefore a matter of importance, as well as a decision on the general question presented by the majority opinion below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

OSCAR H. DAVIS,
Acting Solicitor General.

JULY, 1953.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 218

UNITED STATES OF AMERICA, *Petitioner*

v.

CHARLES E. NELSON, ET AL.

On Petition For a Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 754-779) have not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1953 (R. 779-781). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). See also Rules 37(b)(2) and 45(a), F.R.Crim.P.

QUESTIONS PRESENTED

1. Whether the coercion exerted upon respondent Nelson vitiates his "consent" to an otherwise illegal search and seizure.

2. Whether the rule of *Weeks* v. *United States,* 232 U.S. 383, suppressing evidence unlawfully obtained by an official of the United States, applies to evidence unlawfully obtained by an employee of a congressional committee.

3. Whether the judgment of the Court of Appeals is sustainable under 18 U.S.C. § 3486, and hence correct even if there were no illegal search and seizure.

STATEMENT

The facts as stated in the petition for certiorari are substantially correct and complete. The following testimony before the Senate Special Committee to Investigate Crime in Interstate Commerce, however, is not fully set forth in the petition. Since the court below relied in part upon this evidence to sustain its finding that Nelson's consent to an otherwise illegal search and seizure was in fact coerced, the testimony in question is set forth in full below (pp. 2135-2136) (R. 760-761).

> "The Chairman. You are the only one that can clear it up, and now is your chance, because the committee is not—this is not going to be laughed off with the committee. We are going to the bottom of it, and we are going to bring it to the authorities, and those who are guilty are going to be prosecuted, and if you are one of them, you are going to be in it.
>
> "Now if you are not one of them, now is the time to make it clear, and so far you have not made it clear.
>
> "We are going to take a recess shortly and I simply suggest that you think over carefully and come back when you resume the stand prepared to tell us the truth. Now is your chance, and it is up to you entirely. Do you understand what I say?
>
> "Mr. Nelson. I get the general drift. You don't feel like I am doing what I can.

"The Chairman. No, I do not.

"Mr. Nelson. Believe me, I have never been in this poolroom that he mentions that I can remember.

"The Chairman. I am talking about the whole picture, what we understand is a $6 million operation, from which you have received several hundred thousand dollars. Now you are not going to make us believe that you are as ignorant as you appear to be. Now you, therefore, have the chance to come back this afternoon and tell us the truth if you want to, and if you don't clear it up, you have nobody to blame but yourself if you are involved in some prosecution later.

"Mr. Nelson. I have told the truth.

"The Chairman. Do you understand what I said?

"Mr. Nelson. I take it—

"The Chairman. Do you understand it?

"Mr. Nelson. Do you want me to come back this evening, is that what you want me to do, and talk further?

"The Chairman. I want you to think it over during the lunch recess, think it over—

"Mr. Nelson. Yes.

"The Chairman. (continuing)—and come back prepared to tell us the truth, which so far you have not done.

"Mr. Nelson. I beg your pardon, sir. I have really tried, and have told you the truth.

"The Chairman. That is my opinion.

"Mr. Nelson. I can understand how you may feel that way.

"The Chairman. And you haven't cleared the matter up at all so far. You have the chance.

"Mr. Nelson. What did you want to clear up, sir?

"The Chairman. This whole matter about the different operations which run up to considerable amounts, and from which you have gotten a lot of money, and which you have benefited from, and you cannot make us believe that you don't know what kind of business operations they were.

"Mr. Nelson. I have told you everything that I—

"Senator Kefauver. The committee will meet this afternoon—."

ARGUMENT

The opinion of the court below is in complete accord with the applicable decisions of this and every other federal court. It is predicated on the unimpeachable proposition that consent procured by moral coercion cannot validate an otherwise illegal search and seizure. Such a holding does, of course, as pointed out by the government, "impair the functioning, not only of Congressional investigating committees, but of all federal law enforcement agencies." This impairment is dictated, however, not by the court below, but by the Constitution itself. Moreover, it is manifest in all the applicable decisions of this Court that the rule of *Weeks* v. *United States*, 232 U.S. 383, is applicable to evidence improperly seized by officials of *any* branch of the federal government. Hence this rule was properly applied by the court below to evidence seized under the authority of Congress. Finally, irrespective of whether the evidence in question was the fruit of an illegal search, it was admitted in plain violation of 18 U.S.C. § 3486. This error alone necessitates a reversal of the convictions herein, because it was error prejudicial to all of these respondents.

I.

This case presents a flagrant example of search and seizure in violation of the Fourth Amendment. The circumstances surrounding Nelson's alleged "consent" lead irresistibly to the conclusion that this "consent" is explainable only on the basis of moral coercion. Before it was given, the Committee characterized his conduct as "very dark and very suspicious", "very incriminating", and "contemptuous". Senator Kefauver informed him that this was his chance to make full and free disclosure of everything he knew, and that if he did not do so he would most certainly be prosecuted. He was told "to think it over during the lunch recess".

After lunch he was subjected to a barrage of questions about his financial affairs, during the course of which he "consented" to allow a staff member to *see* his "little red book" of accounts for 1951. At the conclusion of his testimony, after he had supposedly given his "free" and "intelligent" consent to the inspection of his 1951 records, he said, "I am afraid I do not understand what it is you want me to do." Senator Hunt then *ordered* him to lead a staff member to his home and *turn over* to him a statement of his net worth, together with the "little red book".

Once in Nelson's home, the staff member discovered that he could not take the requested records, because they were not yet assembled. Nelson then opened a drawer containing records for 1940-1950. The staff member asked if he could take these records, and Nelson acquiesced. This is the "consent" relied upon by the government to overturn the judgment of the court below.

It is hornbook law that consent to an otherwise illegal search and seizure is nugatory unless it is "freely and intelligently given" without the use of "physical or moral compulsion", under circumstances where such a conclusion is "in accordance with human experience".[1] That the "consent" in the case at Bar did not meet these standards is self-evident. As stated by the court below:

> "Nelson's freedom of choice had been dissolved in a brooding omnipresence of compulsion. The Committee threatened prosecution for contempt if he refused to answer, for perjury if he lied, and for gambling activities if he told the truth. Then, with a warning that he was still under subpoena, it directed him to lead a policeman to his home and there turn over the 'little red book' which it promised to return 'at the very earliest date, so as not to inconvenience [him] any.' Finally, when the policeman entered Nelson's home and learned that the 'little red book' was not available, he examined and took other papers and documents not demanded by the Committee. At no time

[1] *Judd* v. *United States*, 89 U.S. App. D.C. 64, 65, 190 F. 2d 649, 650.

did the Committee or its staff inform Nelson that he would be allowed counsel or that he had a right to refuse to testify or to produce personal papers with regard to self-incriminating matters."

Of course, it is not necessary to warn a witness of his privilege against self-incrimination before his testimony can be used against him, so long as that testimony is voluntarily given.[2] But the Committee in this case did not merely fail to warn Nelson of his privilege; they created the distinct impression that *any claim of privilege would be unavailing.* Prosecution was presented as the *sole alternative* to full and free disclosure of highly incriminating information. Certainly the decision of the court below has not unduly hampered the functioning of congressional committees by forbidding them to present such a choice. The only restriction imposed by this decision is a restriction imposed by the Constitution itself.

Moreover, it must be emphasized that the documents in question do not relate to Nelson's 1951 accounts nor to his net worth. These were the records which he had "consented" to turn over during the hearing, but they were not the records seized. The only records actually taken were accounts for the years 1940 to 1950. Nelson "consented" to turn over these records *only after the staff member was in his home under color of office and had requested permission to take them.* The cases have uniformly held that "consent" under such circumstances is no consent at all.[3]

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[2] *Powers* v. *United States,* 223 U.S. 303; *Wilson* v. *United States,* 162 U.S. 613; *United States* v. *Block,* 88 F. 2d 618 (2nd Cir.), cert. denied 301 U.S. 690.

[3] *Johnson* v. *United States,* 333 U.S. 10; *Amos* v. *United States,* 255 U.S. 313; *Gibson* v. *United States,* 80 U.S. App. D.C. 81, 149 F. 2d 381, cert. denied; *O'Kelley* v. *United States,* 326 U.S. 724; *Ray* v. *United States,* 84 F. 2d 654 (5th Cir.); *Farris* v. *United States,* 24 F. 2d 639 (9th Cir.), cert. denied 277 U.S. 607; *United States* v. *Sully,* 56 F. Supp. 942 (D.C. N.Y.); *United States* v. *Baldocci,* 42 F. 2d 567 (D.C. Cal.); *United States* v. *Marra,* 40 F. 2d 271 (D.C. N.Y.); *United States* v. *Kozan,* 37 F. 2d 415 (D.C. N.Y.); *United States* v. *Slusser,* 270 Fed. 818 (D.C. Ohio); *United States* v. *Abrams,* 230 Fed. 313 (D.C. Vt.).

The government asserts that the standard of coercion applicable in cases of secret interrogation by law enforcement officials is not appropriate to proceedings before a congressional committee. There is in fact, however, only one standard to determine the existence of coercion in any case, *i. e.*, whether the witness was in fact coerced to act as he did. Moreover, as pointed out by the Court of Appeals, "[i]f there is anything to suggest that a congressional committee hearing is less awesome than a police station or a district attorney's office, and should therefore be viewed differently, it has escaped our notice." Indeed, interrogation by a committee which had attained such wide acclaim that its members were regarded as television celebrities and its chairman as presidential timber might be considerably more "awesome" than similar interrogation by an obscure policeman.

In the light of the foregoing facts, it is impossible to uphold the government's contention that the decision of the court below represents a departure from the principles applied by this or any other federal court. The assertion that under this decision "all documents or information transmitted in response to a demand by a person with official authority would automatically be held to be given involuntarily" is utterly untrue. What this decision really constitutes is a reaffirmation of the time-honored doctrine that the coerced waiver of constitutional rights is, in the eyes of the law, no waiver at all.

It is obvious, moreover, that the case at Bar does not present the sort of question which will move this Court to grant certiorari. The Court of Appeals, applying the axiomatic principle that coerced consent cannot validate an otherwise illegal search and seizure, simply decided that respondent Nelson's "consent" was inoperative under the particular facts of this case. Essentially this conclusion resulted from an evaluation of the evidence. This Court has repeatedly stated that it will not grant certiorari to review questions of fact or to resolve issues which depend

in the ultimate analysis upon an evaluation of evidence.[4] Consequently, there is no occasion for this Court to grant certiorari.

II.

The applicability of the Weeks case to evidence illegally obtained by congressional employees was long ago settled by this Court, notwithstanding the contrary assertion of the government. It is true that no case involving such evidence has heretofore been decided by this Court, but the issue was resolved by the Weeks case itself, which held that the rule extends to all evidence illegally obtained "by an official of the United States". Subsequently, in *Burdeau* v. *McDowell*, 256 U.S. 465, the Court refused to suppress illegally obtained evidence because "no official of the Federal government" had anything to do with the seizure. Obviously, then, this rule extends to officials of *every* branch of the federal government, including the legislative.

The policy considerations advanced by the government in support of their position completely ignore the purpose of the Weeks rule. This decision was designed to implement the Fourth Amendment. If material seized in violation thereof could be used as evidence in the federal courts, protection against unreasonable search and seizure would become a mere illusion. It was to prevent encroachment upon this constitutional safeguard that the Weeks rule was adopted. Consequently its applicability must be coextensive with that of the Amendment. And the government itself concedes that the Amendment operates as a restraint upon congressional committees.

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[4] *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175; *United States* v. *Johnson*, 268 U.S. 220; *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508.

III.

Prescinding from the question of illegal search and seizure, the decision of the court below is plainly sustainable under 18 U.S.C. § 3486. This statute expressly prohibits the use of any testimony given by a witness before a congressional committee in a subsequent criminal proceeding against him. Official records and papers produced by him are expressly excepted. It is obvious that this language covers non-official papers of the type produced by Nelson, and hence that these records were used against him in violation of law.

The majority opinion in the court below found it unnecessary to decide this question, but the opinion of the dissenting judge stated that the statute plainly prohibited the use of the records in question against Nelson. The statutory language is so clear that there is really no room for dispute. Moreover, the admission of these records constituted prejudicial error, despite the contrary opinion of the dissenting judge.[5] As stated by the majority, "we cannot say from the record of more than two thousand pages that the jury would have convicted Nelson had all this evidence not been adduced".

This error necessitates a reversal of every conviction in the case at Bar, because the violation of Nelson's rights prejudiced the other defendants as well. The instructions of the trial court left the jury free to consider the evidence in question against all of the defendants. If it had not been improperly admitted against Nelson, however, it could not have been used against the other defendants under any conceivable circumstances. In such cases, this Court has

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[5] The standard for determining the necessity of reversal in a criminal case where improper evidence has been admitted was recently enunciated in *Blumenthal* v. *United States*, 332 U.S. 539, 551. This Court there stated that *even if the remaining evidence is sufficient to sustain a conviction*, the case must be reversed if the inadmissible evidence "was of such importance that . . . the jury might have drawn entirely different inferences from the whole evidence" if it had been excluded.

repeatedly held that violation of one defendant's rights necessitates reversal of the convictions of his co-defendants.[6]

Section 3486 bars the use of this evidence against Nelson. The laws of evidence bar its use against any of the other respondents. Turning first to the substantive count of the indictment, it is plain that these records must be excluded as hearsay against all of the defendants other than Nelson. They are not admissible as entries "made in the regular course of . . . business" under the Federal Shopbook Rule,[7] because they were merely personal work sheets from which Nelson computed his income tax.[8] Moreover, the government made no attempt to qualify them under this rule.

These records were likewise unavailable for use against any of the respondents under the conspiracy count. They should not have been admitted against Nelson because of the pertinent exclusionary statute heretofore cited. The hearsay rule prohibits their use against any of the other respondents. They should not have been admitted against the remaining defendants as declarations of a co-conspirator for two reasons: (1) they were inadmissible against the declarant conspirator, Nelson, and (2) they were not made in furtherance of the conspiratorial objective.

Painstaking analysis of the myriad cases under the federal conspiracy statute has failed to disclose a single instance where a declaration inadmissible against the declarant conspirator has been held admissible against his co-conspirators. Moreover, the basic rules of agency dictate the principle that the declaration of a conspirator, written or oral, must be competent against the declarant conspirator before it can be admitted against his fellow consiprators. A principal becomes responsible for the statement of his agent in the course of employment only vi-

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[6] *McDonald* v. *United States*, 335 U.S. 451; *Ashcraft* v. *Tennessee*, 322 U.S. 143; *Anderson* v. *United States*, 318 U.S. 350.

[7] 28 U.S.C. § 1732.

[8] See *Buckley* v. *Altheimer*, 152 F. 2d 502 (7th Cir.).

cariously. A statement is admitted against the agent, and through the agent it binds the principal. If it is not competent or admissible against the agent, the principal obviously cannot be affected thereby, since his responsibility is purely vicarious and derivative. The theory behind admissibility of a co-conspirator's declarations is analogous to this theory of a principal's vicarious responsibility. Therefore, the same rule should obtain. This rule prevents use of the evidence here in question against the defendants other than Nelson, because § 3486 prohibits its use against Nelson himself.

There is another equally cogent reason why a declaration inadmissible against the declarant conspirator must be inadmissible against his co-conspirators. In a conspiracy case the prosecution must prove that at least *two* people have violated the law, because no one can conspire with himself. Consequently, evidence used to establish the guilt of a co-conspirator likewise contributes to establish the guilt of all the alleged conspirators. A cannot be convicted of conspiring with B unless the jury is convinced that B conspired with A, and therefore any evidence used to establish B's guilt contributes to the proof of A's guilt. As a result, any statute prohibiting the use of certain evidence against A likewise prohibits its use against B in a conspiracy case where they are codefendants, since the nature of conspiracy makes it impossible to "use" evidence against one conspirator but not the others.

It is axiomatic, moreover, that only acts and declarations of a conspirator in furtherance of the conspiratorial objective can be admissible against his co-conspirators.[9]

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[9] *Krulewitch* v. *United States*, 336 U.S. 440; *Fiswick* v. *United States*, 329 U.S. 211; *Brown* v. *United States*, 150 U.S. 93; *Logan* v. *United States*, 144 U.S. 263; *United States* v. *Guido*, 161 F. 2d 492 (3rd Cir.); *Canella* v. *United States*, 157 F. 2d 470 (9th Cir.); *United States* v. *Goodman*, 129 F. 2d 1009 (2nd Cir.); *Kamanosuke Yuge* v. *United States*, 127 F. 2d 683 (9th Cir.); *United States* v. *Nardone*, 106 F. 2d 41 (2nd Cir.), reversed on other grounds 308 U.S. 338.

Obviously neither Nelson's appearance before the Committee nor his turning over of the records in question was in furtherance of any conspiratorial objective. These records were not even *made* in furtherance of the conspiratorial objective laid in the indictment, for they were shown to be personal accounts kept by Nelson to facilitate the preparation of his income tax return. Even in the absence of § 3486, therefore, the evidence in question was not admissible under the "declaration of a co-conspirator" rule.

The judgment of the court below is likewise sustainable on many other grounds not reached by that court. Highly prejudicial income tax returns were admitted over timely objection, in plain violation of 26 U.S.C. § 55 (R. 1045 et seq). The prosecution commented upon the failure of the defendants to take the stand. (R. 1575). Despite the universal rule that such conduct necessitates a mistrial, the court denied a timely motion to withdraw a juror (R. 1576). The trial court likewise committed reversible error in refusing to permit inspection of the grand jury minutes, although defense counsel had reason to believe there was no legally competent evidence before that body and that the indictment was based on coerced testimony (R. 2042). Moreover, there was gross abuse in the admission of a mass of inflammatory evidence relating to transactions beyond the range of the statute of limitations, under the guise of showing the "history" of the conspiracy.[10]

Since the judgment of the court below is sustainable on many grounds, including the admission of evidence excluded by § 3486, it follows that the court below properly reversed all of the convictions herein, regardless of whether there was in fact any illegal search and seizure.

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[10] See *Krulewitch* v. *United States*, 336 U.S. 440, 446; *Pinkerton* v. *United States*, 328 U.S. 640, 644.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

District of Columbia Code § 22-1501 (1951 ed.):

"If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery."

18 U.S.C. § 371 provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only,

the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

18 U.S.C. § 3486 provides:

"No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

28 U.S.C. § 1732 provides:

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."